rights at a profit, their profit would not be income derived from timber extraction. That profit would derive from turning to good account a contract of purchase of timber. The extraction of timber is only in the background.

In the instant case the taxpayer by its contract with the Society took over the position of the Society, albeit without an express assignment of the Society's rights and obligations against and to Government, and in exchange agreed to pay the stated commission to the Society. Equally, it appears to their Lordships, the proceeds of sale of the timber to which the taxpayer became entitled are aptly described as income derived from timber operations.

The second question is whether the three items disallowed as deductions by the Special Commissioners come within section 39(1)(g) of the Act 53. They have already been described. They appear to their Lordships to fall squarely within the description of sums payable for the use of a licence or permit to extract timber, within that statutory provision.

In their Lordships' opinion the conclusion of the Special Commissioners was correct, and they will advise His Majesty the Yang di-Pertuan Agong that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Slaughter & May; Stephenson Harwood.*

SINGAPORE REPORTS

THE FIRST NATIONAL BANK OF CHICAGO v. TAN LAI WAH

[C.A. (Wee Chong Jin C.J., Kulasekaram & Rajah JJ.) May 20, 1981]

[Singapore — Civil Appeal No. 63 of 1980]

Banking Law — Bank granting overdraft facilities — Guarantee for unlimited liability — Plea of non est factum — Plea rejected by appellate court.

Guarantee — Plea of non est factum — Plea rejected by appellate court.

The present appeal arose from a judgment of D'Cotta J. (see [1981] 1 M.L.J. 183) dismissing a claim by the appellants against the respondent for the sum of $2,520,198.91 with interest on a guarantee dated April 18, 1974 by the respondent in favour of the appellants.

The respondent had been a land broker for 17-18 years since 1962. She contended that she did not know that the document which she signed was a guarantee for an unlimited amount otherwise she would never have signed it. Her plea of *non est factum* was accepted by the lower court who dismissed the bank's claim. The bank appealed on the ground that the learned trial judge erred in fact and in law in finding that the plea of *non est factum* had been successfully established by the respondent. The latter contended that the decision of the learned trial judge ought to be affirmed. In addition she submitted that there was no consideration moving from the Bank to her for the said guarantee. She also pleaded that the plaintiffs had been guilty of laches.

Held, allowing the appeal: (1) where oral self-interested testimony is conflicting on a particular matter and there is contemporaneous or near contemporaneous documentary evidence relevant to the matter before the court, such evidence should be also given due consideration by the court, particularly if such documents came into existence long before the matter in question became one of dispute between the parties, before it makes a finding on the matter in issue; in this case regard should be had to the three documents before the court (letters dated April 22, 1974, August 8, 1974 and August 10, 1974);

(2) if the attention of the learned trial judge had been specifically directed to the said documents, he would not have held, as he did, that, in his judgment, the respondent had successfully established the plea of *non est factum*;

(3) having regard to the respondent's long experience as a land broker and other spheres of business — factors which the learned trial judge appeared to have not considered — her mere assertion that she thought the document she signed was one guaranteeing her a half share in the property was unbelievable;

(4) there was good and sufficient consideration moving from the bank to the respondent. Although it is not necessary to record in a guarantee the consideration for which it is given (section 3, Mercantile Law Amendment Act 1856) a bank guarantee usually includes a clause describing why the guarantor has undertaken the liability. The present guarantee was no exception and contained the expressions "continuing advances" and "affording banking facilities" which were quite sufficient in themselves to meet the circumstances under which the guarantee was given;

(5) there is an implied term in the contract of guarantee whereby the Bank, in whose favour the guarantee is given has a similar duty to the guarantor, as indeed it has to the mortgagor, whose property is being sold under its power of sale, to take reasonable care to obtain a proper market price. In this case there was no evidence that the property was sold at an undervalue.

Cases referred to:-

(1) *Saunders* v. *Anglia Building Society* [1970] 3 All E.R. 961.

(2) *G. Merel & Co. Ltd.* v. *Barclays Bank* (1963) 107 S.J. 542.

(3) *Cuckmere Brick Co. Ltd. & Anor.* v. *Mutual Finance Ltd.* [1971] 1 Ch. 949.

CIVIL APPEAL.

F. Mallal for the appellants.

J.B. Jeyaretnam for the respondent.

Rajah J. (delivering the judgment of the Court): This appeal arises from a judgment of D'Cotta J., dated July 3, 1980, dismissing a claim by the appellants (plaintiffs) against the respondent (4th defendant) for the sum of $2,520,198.91 together with interest thereon on a guarantee dated April 18, 1974 by the 4th defendant in favour of the plaintiffs.

The plaintiffs' claim against the 1st defendant, the borrower, was for the sum of $2,520,198.91 with interest thereon at 8% per annum, due and owing by the 1st defendant in respect of overdraft facilities extended by the plaintiff bank to the 1st defendant. The claim against the 2nd, 3rd and 4th defendants arose out of three separate guarantees executed by each of them guaranteeing the due payment by the 1st defendants to the plaintiffs of moneys owing in respect of the said overdraft facilities.

In March 1973 the 2nd defendant agreed to purchase from Tomlinson Pte. Ltd. for about $2.7 million 40,523 sq. ft. of land and bungalow erected thereon and in a dilapidated condition known as No. 10 Tomlinson Road (No. 10), which was then zoned residential on the Master Plan. He was able on his own to pay the 10% deposit on the purchase price but payment to the vendor of the balance of the purchase price was effected by the 1st defendant through overdraft facilities provided for it by the plaintiffs up to the limit of $2.5 million for principal moneys with liberty to the bank to increase such limit up to such further or additional amount as may be fixed by the bank at its absolute discretion for a period of one year from the date of the first drawdown and thereafter the renewal of such overdraft facilities was to be reviewed anew. The conveyance of No. 10 was then taken in the name of the 1st defendant, of which the 2nd and 3rd defendants were directors, and immediately thereafter a legal mortgage, in which the 2nd and 3rd defendants joined in as sureties, was executed, bearing the date May 2, 1973, by the 1st defendants, as owners of No. 10, in favour of the plaintiffs in respect of the said overdraft facilities. Before the mortgage deed was signed the 2nd and 3rd defendants had each of them executed separately on April 18, 1973 unlimited guarantees in favour of the plaintiffs securing the overdraft account. Before the said overdraft facilities was approved by the plaintiffs Messrs. Victor & Mendis, a firm of land valuers, valued No. 10 for the bank at $4.8 million. It should be noted, however, that No. 10 was not valued by the valuers as residential property, which was its then zoning on the Master Plan, but as commercial property, on assumptions the valuers were not justified in making, and which, perhaps, accounts for the great disparity between the actual purchase price and the amount at which No. 10 was valued. It is also relevant to note that the 4th defendant acted as broker in the purchase of No. 10 for which she was paid her commission. It was not disputed that whenever the 1st defendants were unable to meet interest payments on the mortgage the 1st defendants would borrow from the 4th defendant and that she had thus in all lent the company a sum of about $280,000. It was also not in dispute that the 4th defendant (1) had had a Chinese education up till the age of 14 years, (2) could, in her own words, "understand simple every day English, not the profound type", (3) was a land broker of some 17 to 18 years standing, (4) was running an adequately staffed office for this purpose, (5) had a translator and interpreter in her office for translating and interpreting to her, from Hokkien into English and *vice versa* letters and documents relating to her business, (6) had legal advisers whom she could readily call upon, (7) is a fairly competent business woman in a highly competitive field of business, (8) was a director of two companies which she had formed herself and (9) had previously executed guarantees in English.

The first drawdown on the overdraft account was on April 18, 1973. In early April 1974, that is some ten days before the expiry date of the one year overdraft facilities, the plaintiffs advised the 1st and 2nd defendants that they were prepared to review such facilities for a further period provided that additional security or an additional guarantor acceptable to them was provided and that the 4th defendant would be acceptable to them as guarantor as she was well known to them. The 2nd defendant then approached the 4th defendant and obtained her signature on April 18, 1974 to an unlimited guarantee in favour of the plaintiffs in terms similar to the ones he and the 3rd defendant had given to the plaintiffs on April 24, 1973. Her signature was then witnessed by one Lim Sin, her son-in-law, and a partner in the legal firm of Messrs. Lim Sin & Thiam Beng who were her legal advisers. This unlimited guarantee was then delivered to the plaintiffs by the 2nd defendant and the overdraft facilities were then extended by the plaintiffs for a further period of one year. It is common ground that after the date of the guarantee signed by her no further advance was made by the plaintiffs to the 1st defendants.

On April 22, 1974 the plaintiffs wrote to the 1st and 2nd defendants with a copy to the 4th defendant as follows:

> *"Re: How Lee Realty*
>
> We acknowledge receipt of the unlimited Guarantee form signed by Madam Tan Lai Wah and duly witnessed by Mr. Lim Sin, Advocate and Solicitor. Kindly forward to us a copy of the Board of Directors' Resolution appointing Madam Tan a Director of the Company."

Not hearing from the 1st defendant on the 4th defendant's appointment as director, the plaintiffs wrote again to the 1st defendant on May 13, 1974 as follows (*inter alia*):

> As we have not received the Board of Directors' Resolutions appointing Madam Tan as a director, could you please forward this to us as soon as possible."

She was appointed a director of the 1st defendants on June 7, 1976. On December 16, 1976 No. 10 was put up for auction by the plaintiffs, at which although the opening request by the auctioneer was a bid of $880,000, no bids were offered. The bank subsequently sold No. 10 by private treaty to the Urban Renewal Authority in July 1977 for $1,024,955.32.

It was in these circumstances that the plaintiffs commenced proceedings against the 1st, 2nd, 3rd and 4th defendants for the balance of $2,520,198.91 with interest at 8% per annum. Summary judgment was obtained against both the 1st and 3rd defendants; as against the 2nd defendant judgment in default of appearance was entered against him on October 26, 1977; the 4th defendant, on an Order 14 Summons, at which she was represented by counsel, was given unconditional leave to defend on her plea that consideration for the execution of the guarantee was past consideration. It will be noted that at this stage of the proceedings the 4th defendant had not raised the plea of *non est factum* as her primary defence.

The 4th defendant in her further amended defence dated October 24, 1979, the date of the commencement of the trial of the action, raised four defences against the plaintiffs' claim, the *non est factum* plea being raised for the first time:

(1) That at the time she signed the guarantee it was represented to her by the 2nd defendant that what she was signing was a guarantee of her interest in No. 10 which she jointly owned with the 2nd defendant and she honestly believed such representation.

(2) That the plaintiffs did not give any consideration in law or at all for her signing the guarantee.

(3) That she did not by the terms of the guarantee undertake to pay the plaintiffs monies lent to or paid for the 1st defendant prior to and before she signed the guarantee on April 18, 1974.

(4) That her liability under the guarantee, if any, had been discharged by the plaintiffs acting unreasonably in the sale of No. 10 in a manner detrimental to her and thereby prejudicing her.

The learned trial judge in his judgment having said:

"The defence raised two main issues as follows:—

(1) *non est factum;*

(2) that there was no consideration moving from the bank to her for the guarantee she is alleged to have signed as the document upon which she is being sued is not one under seal."

went on to make the following findings on the *non est factum* plea: —

(1) That the guarantee was not read and explained to the 4th defendant before she executed it and that the bank and its agents had failed to discharge their burden;

(2) That it was so represented to the 4th defendant by the 2nd defendant that the document she was signing was one intended to guarantee payment of interest to the plaintiffs on No. 10 and in return for which she was to be given a 50% share in No. 10 whereas in fact the document sued on sought to make her liable without limit for all monies advanced by the plaintiffs to the 1st defendant right from the very beginning;

(3) That there was a radical difference from what the 4th defendant believed she was signing and the document upon which she was being sued;

(4) That taking all the conditions prevailing at the time when the 4th defendant signed the document, she had, in so signing, acted reasonably and prudently in the circumstances.

On these findings and on his reading of *Saunders* v. *Anglia Building Society*[1] (the *Saunders* case) the learned trial judge dismissed the action with costs on the basis that in his judgment the 4th defendant had successfully established the plea of *non est factum.* Further, he went to say that in view of his so finding, the necessity of considering the other defences raised by the 4th defendant did not arise.

Against this judgment the plaintiffs appeal on the ground that in all the circumstances of the instant case the learned trial judge erred in fact and in law in finding that the plea of *non est factum* had been successfully established by the 4th defendant; and the 4th defendant, for her part, contends that the decision of the learned trial judge ought to be affirmed on the grounds hereinafter set out, additional to that relied upon by the trial court: —

(1) That there was no consideration moving from the plaintiffs to the 4th defendant for the said guarantee;

(2) That upon the strict construction of the said guarantee the 4th defendant only undertook to pay to the plaintiffs the monies lent to or paid to the use of the 1st defendant after she signed the said guarantee and that no monies were lent or paid to the use of the 1st defendant after the date the said guarantee was signed by the 4th defendant;

(3) That the 4th defendant has been discharged of her liability under the said guarantee by reason that the plaintiffs have been guilty of laches.

1. *The plea of non est factum*

"The plea of *non est factum* can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning. The burden of establishing a plea of *non est factum* falls on the party seeking to disown the document and that party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading *non est factum* on the principle that no man may take advantage of his own wrong; it is not, however, an instance of negligence operating by way of estoppel." (*Saunders Case 961*).

The evidence of the 4th defendant relevant to her plea of *non est factum* reads as follows: —

"The signature on Exhibit P2 (the guarantee document) is mine. PW3 (second defendant) told me that Mathew Lim from the Bank (plaintiffs) suggested that I become his (second defendant's) guarantor. This was 10 days before P2 was signed. He told me that Mathew Lim had said I was a property owner and would be able to provide him the money to pay for the interest of Tomlinson Road. PW3 said I should be guarantor for this piece of land. PW3 told me I had 50% share in this land and I myself was so interested in it. I did not say anything; subsequently he came with P2 (guarantee document) for me to sign. He never told me about renewing overdraft facilities offered to How Lee Realty Ltd. (first defendant). PW3 came to my office to see me... PW3 (second defendant) told me that Mathew Lim wanted me to sign P2 in respect of my 50% interest in this piece of land. He did not say what the document was. He said to guarantee the land at Tomlinson Road. Yes, I was happy to sign. I was very interested in this piece of land. PW3 (second defendant)

had to give me something in respect of my 50% interest in the land. I was happy to sign P2. I regarded P2 (the guarantee document) as proof that I was holding 50% interest in the land. PW3 did not explain the document to me. He stood there; he was hardly there for 10 minutes. He was in a hurry and asked me to sign the document quickly. He left immediately after I had signed the document. He showed me where to sign. Nothing else was said between PW3 and I; I considered P2 as proof that I held 50% interest in Tomlinson Road. There are so many types of guarantees; we must know what it is about; if we accept it we can act as guarantor. As far as I am concerned I thought that P2 was a guarantee that I had 50% interest in Tomlinson Road... I did not know I was guaranteeing an unlimited amount; if I had known that I would not have signed. PW3 took P2 from me after signing; I never asked him to get my signature witnessed by Lim Sin. Later that afternoon Lim Sin telephoned me, he said, 'Mummy you happy to sign this guarantee in respect of the land at Tomlinson Road'. I said Yes, I was happy.... Nothing else was said. Lim Sin put the receiver down.... He (Lim Sin) never asked me whether I understood everything inside the guarantee... plaintiffs never wrote to me for being a guarantor for an account with them. No one from the Bank spoke to me."

The 2nd defendant's evidence relevant to this plea may be divided into two parts, one dealing with what happened some few days before the guarantee was signed by the 4th defendant and the other with what took place on the day of the signing of the guarantee, namely, April 18, 1974. His evidence relating to the first part reads as follows: —

"Madam Tan Lai Wah recommended me to purchase this property. She was a broker. Property owned by Tomlinson Pte Ltd. Accounts were to be reviewed after one year. For the first year company paid interest regularly; if I was short of money I would borrow from Madam Tan. I did borrow from her. Before expiry date plaintiffs told me they were prepared to review facilities provided I pay 2% commitment fees as well as provide additional security, or guarantor acceptable to the bank. I don't know why plaintiffs wanted additional security or guarantor but they intimated that they would feel more comfortable. I informed plaintiffs I would look for additional security. Plaintiffs suggested Madam Tan as guarantor since I had other business with her. I had discussions with Madam Tan if she would stand guarantor for an extension of another year of facilities given to me. She said that land was good price at $130 per sq. ft. and she agreed to be guarantor. Plaintiffs agreed to accept Madam Tan as guarantor."

From this evidence it seems clear that the 4th defendant some few days before the signing of the guarantee had agreed to stand guarantor in favour of the bank for an extension of another year of facilities given to the 1st defendants.

It was never in dispute that the document the 4th defendant had signed had factually not been read, explained or translated to her. There is however no evidence that this competent land broker had asked either the 2nd defendant or Lim Sin or for that matter her translator-clerk for such reading, explanation or translation before signing.

It would appear from the judgment of the learned trial judge that he had agreed with a submission by counsel for the 4th defendant that there was only one material fact in dispute and that this revolved around what was said by Lim Sin to the 4th defendant when he telephoned her on the afternoon of April 18, 1974 before he attested her signature to the guarantee. With respect we do not agree with this approach. The *non est factum* issue, in our view, did not revolve so much around the credibility or otherwise of Lim Sin, the 4th defendant's solicitor as around the question whether the 4th defendant knew the nature and content of the document she was signing, that is to say, whether she knew that she was signing an unlimited guarantee in favour of the plaintiffs to secure overdraft facilities being extended by the plaintiffs to the 1st defendant for a further one year. Lim Sin's evidence and that of the 2nd and 4th defendants' were not the only available and relevant evidence before the court. Where oral self-interested testimony is conflicting on a particular matter and there is contemporaneous or near contemporaneous documentary evidence relevant to the matter before the court, such evidence should, in our view, be also given due consideration by the court, particularly if such documents came into existence long before the matter in question became one of dispute between the parties, before it makes a finding on the matter in issue. There can, in our view, be no more disinterested, reliable, or weighty evidence than this. There were three such documents before the court. The first was a letter dated April 22, 1974 (AB4) written by the plaintiffs to the 2nd defendant with copy to the 4th defendant and it reads as follows: —

"Re: How Lee Realty

We acknowledge receipt of the Unlimited Guarantee form signed by Madam Tan Lai Wah and duly witnessed by Mr. Lim Sin, Advocate & Solicitor. Kindly forward to us a copy of the Board of Directors' Resolution appointing Madam Tan a Director of the company."

The second was also a letter dated August 8, 1974 also written by the plaintiffs to the 4th defendant's solicitors in reply to a request to them by the said solicitors and it reads as follows: —

"Re: Madam Tan Lai Wah's Guarantee in favour of M/s. How Lee Realty Pte Ltd.

As requested, we enclose herewith a photocopy of Madam Tan's Guarantee. In particular, please note Clause (3)."

The third was yet another letter dated August 10, 1974 written this time by the 4th defendant's solicitors to the plaintiffs and it reads as follows: —

"Madam Tan Lai Wah's Guarantee in favour of M/s. How Lee Realty Pte Ltd.

We thank you for the xerox copy of Madam Tan Lai Wah's Guarantee which was requested by her and acknowledge receipt thereof."

A reading of the first letter, paying special attention to its subject heading makes it, in our view, patently clear that the 4th defendant certainly knew on or about April 22, 1974, if not before, that she had signed an unlimited guarantee, on April 18, 1974, that is to say 4 days earlier, in favour of the 1st defendants and not as she says, a document guaranteeing to her a 50% interest in No. 10. The second and third letters clearly indicate that certainly on or about August 8, 1974, if not before, — that is to say within 3 months of her signing the guarantee — she was aware of the contents of the guarantee she had signed on April 18, 1974. On the basis of her evidence it is difficult to understand why she should have signed a document guaranteeing her a 50% interest in No. 10; in such circumstances one would have thought that it should have been the 2nd defendant, and not she, who should have been the signatory. Again, it is difficult to understand why this document of proof of her 50% interest in No. 10, having been signed,

should have been allowed to be taken away by the 2nd defendant and handed over to the plaintiffs and not kept by her as such proof. It is even more difficult to understand why after sighting the first letter she did nothing about the 2nd defendant having tricked her into signing an unlimited guarantee in favour of the plaintiffs. We are satisfied that, if the attention of the learned trial judge had been specifically directed to these three documents, he would not have held as he did, that, in his judgment, the 4th defendant had successfully established the plea of *non est factum.*

It is also our view that having regard to her long experience as a land broker and other spheres of business as previously set out — factors which the learned trial judge appeared to have not considered — her mere assertion that she thought the document she signed was one guaranteeing her a half share in No. 10 was unbelievable.

2. *Plea of no consideration*

The 4th defendant (respondent) contends that in the circumstances of the instant case there was no consideration moving from the plaintiffs (appellants) to the 4th defendant for the said guarantee. Overdraft facilities up to $2.5 million to the 1st defendants were granted by the plaintiffs for a period of one year from the date of the first drawdown, namely April 18, 1973. These overdraft facilities were secured by a legal mortgage on No. 10 in favour of the plaintiffs and further secured by two unlimited guarantees, one by the 2nd defendant and the other by the 3rd defendant. Sometime before the period of one year came to an end the plaintiffs were willing to renew the said overdraft facilities for a further period of a year provided additional security or an additional guarantee was brought in as further security. It was to meet this stipulation for renewal of the overdraft facilities that the 4th defendant (respondent) was brought in. In our view, this was good and sufficient consideration moving from the plaintiff bank to the 4th defendant. Although it is not necessary to record in a guarantee the consideration for which it is given (section 3, Mercantile Law Amendment Act 1856) a bank guarantee usually includes a clause describing why the guarantor has undertaken the liability. This guarantee is no exception and it contains the clause "In consideration of the First National Bank of Chicago ... at our request *making or continuing advances* (emphasis ours) or otherwise giving credit or *affording banking facilities* (emphasis ours) for so long as the bank may think fit." In our view, the expression "continuing advances" and "affording banking facilities" are quite sufficient in themselves to meet the circumstances under which the guarantee in the instant case was given. We accordingly reject the 4th defendant's plea of no consideration.

3. *Plea of no liability for past loans*

The 4th defendant (respondent) says that by the terms of the guarantee she did not undertake to pay the plaintiffs monies lent to or paid for the 1st defendant, the obligor, prior to and before she signed the guarantee. The operative clause of the guarantee reads, "I ... HEREBY GUARANTEE on demand in writing being made to me to pay and satisfy to the bank all sums of money which are now or shall at any time be owing to the bank anywhere on any account whatsoever ..." As a matter of construction of the operative clause, the 4th defendant (respondent) thereby guaranteed to the bank not only all sums of money that were owing to the bank on April 18, 1974, being the date of the said guarantee, but also all those that were owing to it from time to time until written demand when the debt crystallised and became due and payable. Here again we see no merit in this plea and reject it.

4. *Plea of laches*

The 4th defendant (respondent) contends that she has been discharged under the said guarantee by reason that the plaintiffs (appellants) have been guilty of laches. She cites four instances of such guilt, namely that:

(i) In or about July or August 1975 the plaintiffs their agent or servant prevented a sale at a price of $4.5 million of the property which was mortgaged to the plaintiffs to secure the amount due to the plaintiffs on the 1st defendant's account. The price was well in excess of the amount due to the plaintiffs on the said account.

(ii) In or about March 1976 the plaintiffs unreasonably refused to give their consent to a sale of the said property at a price of $2.5 million which price was later increased to $3 million insisting upon a price of $4 million before they would consent. At the material time, the amount due to the plaintiffs on the account of the 1st defendant was only $3,028,653.35.

(iii) In December 1976 the plaintiffs unreasonably refused an offer to purchase the said property for $1,256,213 made at an auction sale at which the property had been put up for sale by the plaintiffs under their power of sale.

(iv) In July 1977 the plaintiffs sold the said property for only $1,024,955.32,

and says that in all these four instances the plaintiffs acted without her consent and/or knowledge and that she had not been kept informed by the plaintiffs.

Acting in accordance with the terms and conditions of the mortgage the plaintiffs sold No. 10 by private treaty to the Urban Renewal Authority for the sum of $1,024,955.32. It is to be noted that Clause 5(v) of the mortgage provides that "the bank shall not be answerable for any involuntary loss happening in or about the exercise or execution of any power conferred upon the bank by these presents or by the Conveyancing and Law of Property Act (Cap. 268)."

Instance (i). There is no satisfactory evidence on this as to a firm offer to buy. There is some evidence of talks as to possible purchase and no more. In any event all these talks relate to the purchase of No. 10 only in the event of the Competent Authority granting a conversion of use from residential to commercial.

Instance (ii). Here again the offer to purchase at $2.5 million, later increased to $3 million, was conditional on No. 10 being converted to commercial

use and approval of layout plans being obtained by the owners of No. 10, namely the 1st defendants.

Instance (iii). There is no evidence to support these allegations. In fact the evidence on record negatives these allegations. The evidence of the Assistant Manager of the plaintiff bank is that, far from there being a bid for $1,256,213, at the auction, there was no bid at all and her evidence is supported by Exhibit P12 which records that on the date of the live auction, namely December 16, 1976 "the opening request was for a bid of $880,000. No bids were offered".

Instance (iv). Here the plaintiffs did in fact sell No. 10 by private treaty for the sum of $1,024,955.32 as alleged. The gravamen of the charge is that it was sold at an undervalue. It is in evidence that before this sale the plaintiffs had not obtained a valuation. The question here is whether the plaintiffs should reasonably have sold No. 10 at this price or at some other higher figure. The evidence adduced at the trial and which is relevant to this aspect of the matter is as follows:— (1) Exhibit P10 states that the appraised value of No. 10 in August 1975 was $1,418,305 on existing "use" basis. (2) Solicitors' letter dated July 23, 1976 written on behalf of the 1st defendant company and all the three guarantors who were also its directors to the solicitors of the plaintiffs which states, *inter alia,* that the price of $1.5 million for No. 10 is above the current market value (Exhibit P25). (3) No bids were offered for No. 10 at a live auction on December 16, 1976, although the opening request by the auctioneer was for a bid of $880,000. (4) The evidence of the Assistant Manager of the plaintiff bank at page 35F of the record regarding the sale of No. 10 to the Urban Renewal Authority in July 1977 which runs as follows:—

"Eventually property sold on a residential basis for $1 million; property market fell at that time."

The evidence that "property market fell at that time" was not challenged by the 4th defendant.

As it is the 4th defendant who is alleging that No. 10 was sold at an undervalue the burden of proof is on her. She, however, did not see fit to produce expert independent evidence to say that when No. 10 was sold to the Urban Renewal Authority it was at an undervalue. In these circumstances and on the evidence before the court we are in no position to say whether the plaintiffs had in fact sold No. 10 at an undervalue. We are of the view that the 4th defendant had not discharged her burden of proof.

As regards her contention that the plaintiffs acted in the said sale without her knowledge and/or consent and that she had not been kept informed of such sale by the plaintiffs we are of the view that neither in law (*G. Merel & Co. Ltd.* v. *Barclays Bank*[2]) nor under the guarantee are there any such obligations owed by the plaintiff bank to the guarantor. In the case of a mortgage "It is now clearly established that a mortgagee, when exercising his power of sale, owes a duty to the mortgagor to take reasonable care to obtain a proper price. The burden of proof is on the mortgagor to prove breach of this duty by the mortgagee" (*Fisher & Lightwood's* Law of Mortgage (9th Edn.) page 368). See also *Cuckmere Brick Co. Ltd. & Anor.* v. *Mutual Finance Ltd.*[3] Beyond this duty the mortgagee has no duty to inform or obtain the consent of the mortgagor or keep him informed of the sale of the mortgaged property. In the instant case the rights and duties of the plaintiff bank and of the 4th defendant are governed by the guarantee. There is no provision in the guarantee which requires the plaintiffs to inform or obtain the consent of the 4th defendant or keep her informed of the sale of the mortgaged property. However, we are of the view that there is an implied term in the contract of guarantee whereby the bank, in whose favour the guarantee is given has a similar duty to the guarantor, as indeed it has to the mortgagor, whose property is being sold under its power of sale, to take reasonable care to obtain a proper market price. As we have said before there is no evidence that No. 10 was sold at an undervalue.

For these reasons the appeal must be allowed with costs here and below.

Appeal allowed.

Solicitors: *Rodyk & Davidson; J.B. Jeyaretnam & Co.*

T.H. LTD. v. THE COMPTROLLER OF INCOME TAX

[D.C.A. (Chua J.) January 14, 1981]

[Singapore — District Court Appeal No. 39 of 1979]

Revenue Law — Property tax — Change in "treatment of an item of expense" — Change disallowed by Board — Onus on company to show good reason for change — Board's decision affirmed by court — Income Tax Act (Cap. 141), s. 83(3).

Property Tax — Question of law — Reliance by court on evidence of accountants — Evidence of accountants not conclusive.

The present appeal arose from a Notice of Assessment, 1975, against which assessment the company appealed to the board which dismissed the appeal with costs. The company then appealed to the court.

The company, a public company, carried on business as a housing developer. Since its incorporation (in 1970), the company purchased various parcels of land, some of which were developed while the others were held in its "land bank". As a consequence of a slump in the property market prevailing in Singapore around 1974, several development projects were halted in midstream and were delayed for about five years.

In its accounts pertaining to its various development projects the company had adopted the "completed contract" cost accounting system, whereby profit is recognised only when the contract or project is completed. Under this system, expenditure incurred in a development together with receipts from booking fees and progress payments are accumulated during the course of the project and profit is not reported until the project is substantially completed.

For the accounting years 1970 to 1973 property tax incurred annually in respect of properties held by the company was "capitalised" in the balance sheet as part of the overall development expenditure and did not appear in the profit and loss accounts. However, for the financial year 1974, payments of property tax were for the first time treated as an item of expenditure and charged into the debit side of the profit and loss account. Property tax amounting to $253,980 was claimed as an item of allowable expenditure